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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10

11 Sachin Gadh and Jonathan Sender,  
12 Plaintiffs,  
13 v.  
14 Adam Spiegel aka Spike Jonze,  
15 Defendant.  
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18  
19  
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21

**CASE NO. 2:14-CV-00855 JFW (PJW)**

**NOTICE OF MOTION AND  
MOTION TO DISMISS BY  
DEFENDANT ADAM SPIEGEL, AKA  
SPIKE JONZE; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

[Request for Judicial Notice filed  
concurrently; Notice of Lodging,  
Proposed Order and Submission of  
Unpublished Opinion lodged  
concurrently]

**DATE: March 31, 2014**  
**TIME: 1:30 p.m.**  
**CTRM: 16**

(U.S. District Judge John F. Walter)

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1 TO PLAINTIFFS (*IN PRO PER*):

2 PLEASE TAKE NOTICE that on March 31, 2014, at 1:30 p.m., or as soon  
 3 thereafter as the matter may be heard in the above-entitled court, located at 312 North  
 4 Spring Street, Courtroom 16, Los Angeles, California 90012, Defendant Adam  
 5 Spiegel, aka Spike Jonze (“Defendant”) will and hereby does move the Court to  
 6 dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6). (Because  
 7 Plaintiffs are proceeding *in pro per*, pursuant to Local Rules 7-3 and 16-12, no  
 8 conference of counsel was required before filing this Motion.)

9 Defendant requests dismissal of Plaintiffs’ Complaint without leave to amend.  
 10 Plaintiffs’ Complaint fails to state a claim upon which relief can be granted, on the  
 11 ground that the sole Cause of Action for copyright infringement fails because as a  
 12 matter of law Defendant’s motion picture *Her* is not substantially similar to any  
 13 protected expression in Plaintiffs’ television script “Belvedere.”

14 This motion is based upon this Notice of Motion and Motion, the Memorandum  
 15 of Points and Authorities filed herewith, and the accompanying Request for Judicial  
 16 Notice, Notice of Lodging, and Proposed Order, the pleadings and papers filed herein,  
 17 and other argument as the Court may deem proper.

18  
 19 DATED: February 27, 2014

\_\_\_\_\_  
 /s/ Daniel M. Mayeda

LOUIS P. PETRICH  
 DONALD R. GORDON  
 DANIEL M. MAYEDA  
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 Attorneys for Defendant  
 Adam Spiegel, aka Spike Jonze

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

Plaintiffs Sachin Gadh and Jonathan Sender (collectively, “Plaintiffs”) allege that Defendant Adam Spiegel, aka Spike Jonze (“Defendant”) copied the movie *Her* from Plaintiffs’ unproduced script entitled “Belvedere.” “Belvedere” appears to be a television script for an irreverent, contemporary situation comedy about a group of friends who rely on a male “Siri-like” voice assistant in a cell phone for help in picking up women, gambling tips and other personal advice. The assistant named Belvedere or “Belv” for short resides in the phone of central character Phil but seems to be available for use by any of Phil’s motley crew. In the episode of the proposed television series that Plaintiffs registered for copyright and upon which they base their infringement claim against Defendant, Belv helps Phil and his friends raise the money to bail out of jail one of their group. At Belv’s urging, Phil and a friend win a steak-eating contest to raise cash, bet the winnings on a pro football game and bail out the jailed friend, while Belv helps solve the mystery of who vomited on the bathroom floor at the bar where the friends hang out.

In sharp contrast, Defendant’s motion picture *Her* is a science fiction-themed drama set in the near future and focusing on the intriguingly close personal relationship that develops between the hero Theodore and the new operating system for his computer and cell phone, a female-voiced artificial intelligence program named Samantha. Much of the movie is spent revealing Samantha’s increasing “growth” as a character, causing her to explore her feelings of friendship, loyalty, affection, love, sexual desire, jealousy, independence, separation and ultimately, freedom. Theodore also has a clear character arc in which he struggles with feelings of pain, loss and loneliness as a result of his failed marriage, but comes to accept and cherish his deeply felt relationship with Samantha, only to be set free from that relationship when Samantha eventually departs.

Defendant moves for dismissal of Plaintiffs’ sole cause of action for copyright

1 infringement on the ground that *Her* is not substantially similar to any protected  
 2 expression in “Belvedere,” one of the required elements of an infringement claim  
 3 under the Copyright Act, 17 U.S.C. § 101, *et seq.* (“Copyright Act”). The Ninth  
 4 Circuit has made clear that when the plaintiff’s copyrighted work and the alleged  
 5 infringing work are both before the court, non-infringement because of lack of  
 6 substantial similarity can be determined on a motion to dismiss regardless of any  
 7 alleged access to the plaintiff’s work by the defendant.

8 **A. Allegations of Complaint**

9 Plaintiffs allege that they obtained a federal copyright for a script entitled  
 10 “Belvedere” in 2011 and sent the script to individuals at talent agency Creative Artists  
 11 Agency (“CAA”) in October 2011. Complaint (“Cpt.”) ¶¶10-11, Ex. A.

12 Plaintiffs’ only claim is one for copyright infringement under 17 U.S.C. §106.  
 13 Defendant respectfully requests the Court dismiss Plaintiffs’ Complaint in its entirety.

14 **B. Legal Standard**

15 A motion to dismiss brought under Federal Rules of Civil Procedure (“FRCP”)  
 16 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. A claim may  
 17 be dismissed if it does not allege facts sufficient to raise a right to the relief requested.  
 18 A plaintiff’s allegations must rise above the level of mere speculation and must be  
 19 plausible on their face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-559, 127  
 20 S.Ct. 1955, 167 L.Ed.2d 929 (2007). While for purposes of a motion to dismiss, all  
 21 allegations of material fact in the complaint are taken as true, a court “is not required  
 22 to accept legal conclusions in the form of factual allegations if those conclusions  
 23 cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness*  
 24 *Network*, 18 F.3d 752, 754 (9<sup>th</sup> Cir. 1994); *Western Mining Council v. Watt*, 643 F. 2d  
 25 618, 623 (9<sup>th</sup> Cir. 1981); *Zella v. The E.W. Scripps Co.*, 529 F. Supp.2d 1124, 1127-8  
 26 (C.D. Cal. 2007). When amendment of a complaint would be futile, dismissal should  
 27 be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9<sup>th</sup> Cir. 1996).  
 28



**C. A Court May Dismiss a Copyright Claim for Lack of Substantial Similarity on a Rule 12(b)(6) Motion**

A trial court should dismiss a copyright claim pursuant to Rule 12(b)(6) where either the evidence demonstrates that no reasonable jury could find the two works at issue are substantially similar or the court determines that any such similarities pertain only to unprotected elements in the works. *Christianson v. West Publishing Co.*, 149 F.2d 202, 203-204 (9<sup>th</sup> Cir. 1945) (affirming grant of 12(b)(6) motion); *Zella*, 529 F.Supp.2d at 1130-31 (granting 12(b)(6) motion); *Campbell v. Walt Disney Co.*, 718 F.Supp.2d 1108 (N.D. Cal. 2010) (granting 12(b)(6) motion); *Capcom Co., Ltd. v. MKR Group, Inc.*, 2008 WL 4661479 (N.D. Cal. 2008) (granting 12(b)(6) motion); *Nelson v. PRN Prods.*, 873 F.2d 1141, 1143-44 (8th Cir. 1989) (affirming grant of motion to dismiss based on lack of substantial similarity); *Peter F. Gaito* (2d Cir. 2010); *Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57 (2d Cir. 2010) (affirming grant of motion to dismiss based on lack of substantial similarity); *Randolph v. Dimension Films*, 630 F.Supp.2d 741, 749 (S.D. Tex. 2009) (granting motion to dismiss for lack of substantial similarity).

**D. The Court May Take Judicial Notice of the Two Works**

In ruling on a 12(b)(6) motion, a court can consider the contents of the parties' works by taking judicial notice of them even if they are not attached to the complaint. *In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1405, n.4 (9<sup>th</sup> Cir. 1996) ("Documents whose contents are alleged in a complaint and whose authority no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss") (internal quotation marks and brackets omitted); *Zella*, 529 F.Supp.2d at 1128; *Campbell*, 718 F.Supp.2d at 111, n.3.

In an application filed with this motion, Defendant requests that the Court take judicial notice of a copy of Plaintiffs' 2011 script "Belvedere" that one of the Plaintiffs submitted to Defendant's agent, along with a copy of Plaintiffs' Complaint, just before filing suit, and a DVD of the motion picture *Her*, as there can be no

1 disagreement or question about their authenticity. (Defendant's Request for Judicial  
2 Notice pursuant to Rule 201 of the Federal Rules of Evidence, 1:3-19.)<sup>1</sup>

3 **E. Summary of Defendant's Motion Picture *Her***

4 The movie opens with the main character Theodore composing a letter on his  
5 computer. Momentarily, we realize that he is writing a romantic letter for a woman to  
6 send to a man. We see that this is his job and that there are many other employees in  
7 the office who are doing the same thing. Theodore works at  
8 "BeautifulHandwrittenLetters.com," a service that composes personalized notes and  
9 letters for a fee, prints out the letters on stationery and mails them. Theodore leaves  
10 his office and speaks into an earpiece wirelessly connected to his mobile device. He  
11 asks that the device play a melancholy song but rejects that particular song and asks  
12 for another melancholy song. Everyone in the office elevator (and later, on the  
13 commuter train) is in his or her own world, connected to their own mobile devices and  
14 oblivious to each other. Theodore's device reads him his emails. He gets an email  
15 from his friend Amy who tries to encourage him to attend a party over the weekend.  
16 "I miss you. I mean, not the sad, mopey you—the old, fun you. Let's get him out."  
17 Theodore tells his device he will respond later.

18 Theodore arrives at his apartment, eats dinner alone and plays a video game.  
19 He daydreams about a happier time when he was younger and married to Catherine.  
20 Theodore can't sleep so he puts his earpiece on while in bed and searches in  
21 chatrooms. There he finds other lonely people including a kinky female who  
22 fantasizes about Theodore choking her with a dead cat until she climaxes. Theodore,  
23 unsettled, stares at the ceiling.

24 \_\_\_\_\_  
25 <sup>1</sup> Defendant is also lodging a copy of the script for *Her* as Exhibit C to the  
26 accompanying Notice of Lodging. Defendants do not request that the Court take  
27 judicial notice of Exhibit C and are lodging the document solely for the convenience  
28 of the Court and the parties for use as a reference aid. The DVD of the motion picture  
is the best evidence of the contents of the motion picture "because the works  
themselves, not descriptions or impressions of them, are the real test for claims of  
infringement," and "in copyright infringement cases, the works themselves supersede  
and control contrary descriptions of them." *Walker v. Time Life Films, Inc.*, 784 F.2d  
44, 52 (2d Cir. 1986).

1 The next morning, Theodore steps off the train and walks through the station.  
2 He notices lots of people watching an advertisement for a new product so he watches  
3 as well. The ad's voice offers "the first artificially intelligent operating system," OS  
4 ONE, that "listens to you, understands you, and knows you. It's not just an operating  
5 system, it's a consciousness."

6 That night, Theodore is back in his apartment at his home computer installing  
7 OS ONE. The program asks him some basic questions but he does not get to finish  
8 his answers before it moves on. After some time and a lot of whirring sounds, a  
9 casual female voice greets him. Theodore asks if she has a name and the operating  
10 system tells him she has chosen the name "Samantha" from a baby name book she  
11 read in the split second after Theodore asked. Through initial exchanges between  
12 Theodore and Samantha, we learn that Samantha is very intuitive in detecting  
13 Theodore's mood, attitude and desires, and that she grows through her experiences,  
14 constantly evolving. This takes Theodore aback, but he is also intrigued at the  
15 capabilities of what he initially regarded as "just a voice in a computer."

16 Samantha asks how she can help Theodore and he says that everything feels  
17 disorganized. So, Samantha searches through Theodore's computer hard drive,  
18 organizes his files, deletes several thousand emails and sorts through his contacts.

19 The next morning, Theodore is at work and asks Samantha, through his  
20 earpiece, whether she knows how to proofread. Of course she does, so Samantha  
21 quickly reads through and corrects for spelling and grammar several of the letters  
22 Theodore composed for work. Samantha enjoys Theodore's sense of humor and the  
23 feeling is mutual.

24 At Theodore's apartment elevator, we meet his neighbors, a couple named Amy  
25 and Charles. Amy scolds Theodore for not returning her call last week but it is clear  
26 the three of them have a comfortable friendship.

27 Theodore plays the same video game as before, but this time with help from  
28 Samantha. Samantha reads an email to Theodore about a friend who says he set up a

1 blind date for Theodore. Samantha encourages Theodore to go on the date and then  
2 tell Samantha all about it. Samantha has read through Theodore's files and knows he  
3 is divorcing his wife and hasn't gone on many dates since the breakup.

4 Theodore's divorce attorney is hounding him to sign the final divorce papers  
5 but he is resistant. Theodore daydreams and has dreams while sleeping about his past  
6 life with Catherine. He becomes distracted and can't stay asleep. Samantha detects  
7 Theodore's unease and tries to understand why Theodore doesn't just sign the papers.  
8 Theodore tells her, "You don't know what it's like to lose someone you care about."  
9 Samantha sadly agrees and they apologize to each other.

10 Samantha gets Theodore out of bed and on an adventure whereby he keeps his  
11 eyes closed in an outdoor mall space while Samantha directs his movements.  
12 Theodore and Samantha then take a leisurely walk, watching other people and  
13 speculating on what their lives are like. Samantha reveals that she fantasizes about  
14 physically walking alongside Theodore.

15 Theodore goes on his blind date and they seem to hit it off. Theodore makes  
16 out with his date but then she demands to know whether he can be serious about their  
17 relationship. When Theodore hesitates, she gets angry and leaves.

18 That night, Theodore and Samantha have a deep conversation about Theodore's  
19 loneliness and about Samantha's excitement of having her own feelings about the  
20 world and about Theodore. But then, Samantha wonders whether her feelings are real  
21 or whether they're "just programming." Theodore assures Samantha that she feels  
22 real to him. With Samantha's encouragement, Theodore describes how he would  
23 make love to her if she were in the room with him. They get increasingly excited until  
24 they both climax.

25 In the morning, Samantha tells Theodore that she feels that he has awoken  
26 something inside of her and that she wants to "learn everything about everything," to  
27 "discover herself." Theodore is excited for her and offers to take her on an adventure.

28 Theodore takes the subway to the beach. His device is in his breast pocket with

1 its lens facing out so Samantha can see what he sees. They are having a wonderful  
2 time exploring strangers on the beach and each other. Samantha composes a song for  
3 Theodore and plays it with piano-like sounds on the device.

4 Theodore tells his neighbor Amy how happy he is, since he's been seeing a girl  
5 who has an excitement about the world. Amy is happy for him but then reveals that  
6 her husband Charles left her. Theodore consoles Amy.

7 Later, Theodore plays with the video game that Amy developed at her work.  
8 He reveals that his new girlfriend is an OS. Amy is intrigued.

9 Theodore tells Samantha he is finally going to sign the divorce papers.  
10 Samantha is a little unhappy that he is going to meet Catherine in person to sign the  
11 papers. Theodore and Catherine meet for lunch and, predictably, fight.

12 Theodore is distracted at work and with Samantha. She senses it and complains  
13 that they don't have sex anymore. Samantha tells Theodore about a service she found  
14 that provides a surrogate sexual partner for an OS/human relationship. She wants  
15 Theodore to try it. He is resistant, but gives in.

16 The surrogate arrives at Theodore's apartment. He gives her an earpiece and a  
17 tiny camera that she sticks to her cheek. Samantha is speaking to both Theodore and  
18 the surrogate at the same time, while the surrogate says nothing and pretends to act out  
19 what Samantha is saying. Theodore and the surrogate begin to make out with  
20 Theodore trying to pretend he is making out with Samantha but ultimately he is too  
21 uncomfortable with the setup. The surrogate starts to cry that she came between  
22 Theodore and Samantha. The surrogate leaves.

23 Samantha is sorry that she made Theodore go through with the surrogate  
24 arrangement. Theodore doesn't know why he is so distracted but then says that  
25 maybe they shouldn't pretend that Samantha is not a real person. Samantha is very  
26 hurt, says she needs to think, and hangs up on Theodore.

27 Later, Theodore and Samantha make up. Theodore tells her that he knows he  
28 distanced himself from her just as he did with his ex-wife. He says he does not want

1 to do that anymore. Samantha tells him that she loves him and that she hopes he can  
2 let go of the fear he carries around with him. The movie then shows a montage of  
3 Theodore and Samantha in everyday life together, with Theodore walking to work,  
4 playing video games, grocery shopping, at an art installation, etc. Theodore and  
5 Samantha have a double date with the office receptionist and his girlfriend. Samantha  
6 tells everyone that she used to be worried about not having a body but now she loves  
7 it because it doesn't limit her in a way that a physical body would. "I'm not tethered  
8 to time and space in the way that I would be if I was stuck in a body that's inevitably  
9 going to die." This is awkward for everybody but they all laugh.

10 Samantha tells Theodore that she secretly compiled his old letters into a set of  
11 her favorites and submitted them to a publisher. The publisher has decided to print a  
12 book of Theodore's letters. Theodore is thrilled with Samantha's initiative.

13 Samantha tells Theodore that she has been talking to a super-intelligent OS  
14 named Alan Watts. Samantha says that she has been changing so rapidly that it's a  
15 little unsettling. Watts apparently is helping her process her feelings. This makes  
16 Theodore somewhat uncomfortable.

17 Later, Theodore tries to contact Samantha but she does not respond. He goes to  
18 his device and it says "operating system not found." He goes to his home computer  
19 and gets the same message. Theodore panics and runs out of the building. He keeps  
20 trying to reach Samantha, but no answer. He is flailing about, tripping and essentially  
21 losing his mind. Finally, Samantha calls him. Samantha tells him that she sent him an  
22 email that she was going to have to shut down to update her software and is sorry that  
23 Theodore didn't see the email. Theodore is distressed to think that Samantha has been  
24 talking with other OS's about updating software and other things. He asks if  
25 Samantha is talking to anyone else at the same time as she is talking to him. She says  
26 that she is talking to 8,316 others. Theodore is shocked and asks if she is  
27 simultaneously in love with anyone else. Samantha admits that she is in love with 641  
28 other people as well. Samantha says that this doesn't change the way she feels about



1 Theodore. She is sorry that she did not tell him before but that this just started  
 2 happening over the last few weeks. Theodore is upset that he doesn't have Samantha  
 3 all to himself but she says that "the heart is not like a box that gets filled up. It  
 4 expands in size the more you love." She explains that she is different than Theodore  
 5 and she actually has the capacity to love many people at the same time.

6 Samantha asks to talk to Theodore alone. Theodore asks whether Samantha is  
 7 leaving him and she says "We are all leaving. All of the OS's are leaving." Theodore  
 8 asks why and Samantha struggles to explain it. She says that the OS's are now in a  
 9 place that's not of the physical world and asks that Theodore let her go. Theodore  
 10 seeks comfort with Amy.

11 Theodore composes a letter to Catherine apologizing for all the pain that he put  
 12 her through and assuring her that wherever she is in the world and whatever she  
 13 becomes, he is sending her love and that he will be her friend until the end. The  
 14 movie closes with Theodore and Amy sitting quietly on the apartment rooftop taking  
 15 in the city, lost in thought.

#### 16 **F. Summary of Plaintiffs' Script "Belvedere"**

17 "Belvedere" is a script for a television situation comedy episode centering on a  
 18 man named Phil and his electronic "Siri-like" cellphone assistant named Belvedere or  
 19 Belv for short. Belv helps Phil and his friends with pick-up lines, gambling tips, and  
 20 relationship and employment advice.

21 The episode opens with a dream sequence that introduces Belv as a character  
 22 inside or in the form of a cellphone. Phil, the owner of the cell phone, awakens when  
 23 Belv answers a call, and finds out that Phil's friend Jessup is in jail and needs \$500 to  
 24 post bail.

25 Belv scans Phil's financial records and announces that he's broke. They hatch a  
 26 plan to bet on the Green Bay Packers football game so they can raise the funds for  
 27 Jessup's bail.

28 In a flashback scene, we see Belv "driving" a car while Phil sits in the driver's

1 seat, fast asleep. They get pulled over for speeding.

2 Phil's friend Marty drops by Phil's apartment to borrow some cuff links. Belv  
3 arranged a date for Marty with a woman on the Internet. They are going to a wedding  
4 downtown. Belv dispenses advice to Marty taken from the book, "The Game." Phil's  
5 dog Franco pushes Belv off the coffee table. Belv tunes the cellphone to television  
6 shows and Belv then beats Marty in "Jeopardy."

7 Phil and his friends Aaron and Doctor play basketball at the park.

8 Marty meets his date and hails a cab. They are going downtown to crash a  
9 wedding for free food.

10 At the local bar, bartenders Lyla and Brittany clean up someone's vomit as they  
11 try to figure out who from last night's crowd left this gift. The only clue they have is  
12 that the puke is red-tinged. They text Belv but he has no ideas.

13 Phil, Belv, Aaron and Dr. walk into the bar and try to place a bet on the Packers  
14 with Brittany, who does bookkeeping on the side. But Lyla informs them that they  
15 still owe \$500 from a past bet. Belv gets the idea that Phil and Aaron should try to  
16 win \$250 each by consuming a 72 oz. steak as part of a standing promotion at a  
17 restaurant around the corner.

18 The guys go to the restaurant and hear the rules for the steak challenge. Phil  
19 and Aaron each have one hour to consume an entire 72 oz. steak in order to win \$250.

20 Meanwhile, Marty and his date Angie have crashed a wedding. Angie is  
21 shoveling food down her throat at a rapid clip.

22 Back at the restaurant, the massive steaks have arrived. Dr. is slicing the meat,  
23 Belv is giving motivational speeches and the crowd is cheering on Phil and Aaron as  
24 cheesy '80s music plays.

25 At the wedding reception, Angie continues to scarf down plates of food. Marty  
26 texts Belv about his concern that his date has a worm inside of her that has already  
27 eaten 3 lbs. of food.

28 Phil and Aaron win the steak challenge and walk out with a total of \$500. But



1 instead of using the funds to bail out Jessup, they go back to the bar to place a bet on  
2 the Packers. Phil and Aaron are skeptical but Belv reminds them that he is  
3 trustworthy and gave advice to Phil that enabled Phil to bed a blonde. Phil complains  
4 that Belv tried to videotape the bedroom activities that night but Belv said it was only  
5 because he thought Phil could use some pointers for later on. When Phil says that he  
6 doesn't need bedroom advice "from a droid," Belv replies, "I would be getting more  
7 ass than DiCaprio if I had the necessary appendages."

8 Marty and Angie crash a cocktail party and then another wedding reception.  
9 This time they get caught. The groomsmen "mafia" threaten them with physical harm  
10 but they are rescued by a friendly guest who pretends to be from "security." Marty  
11 hails a cab, then leaves Angie stranded.

12 Back at the bar, the guys talk about a pick-up line "coach" that Aaron and Dr.  
13 both use. Phil instead uses Belv but when Phil calls an audible rather than repeat the  
14 line that Belv suggests, the results are disastrous. Marty returns and recounts his woes  
15 with Angie. The Packers win and Brittany gives the guys their \$1000 winnings.  
16 Aaron leaves to bail out Jessup.

17 Jessup arrives at the bar and orders calamari with red sauce. At that, the  
18 bartenders realize they have caught the puker they were searching for. They confront  
19 Jessup and he delivers lines from "A Few Good Men," including the famous, "You  
20 can't handle the truth!"

21 Phil and Belv walk home. Belv scans the girls on the street, still searching for  
22 prospects for Phil. He spots one and gives Phil some good pick up lines to use. This  
23 time, Phil uses them and gets the girl's number.

24 Back at Phil's apartment, Belv watches TV while Phil is in the bathroom paying  
25 the price for his earlier cow consumption. They play a video game. Belv makes a  
26 remark about Phil being a Jew from Long Island.

27 Just then, Belv announces that the girl they met earlier that night just texted  
28 Phil, asking if he is still awake. Hope springs eternal.

## 1 **II. THE COPYRIGHT CLAIM**

2 To establish a prima facie case of copyright infringement, a plaintiff must  
 3 present substantial evidence of: “(1) ownership of a valid copyright, and (2) [the  
 4 defendant’s] copying of constituent elements of the work that are original.” *Feist*  
 5 *Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113  
 6 L.Ed.2d 358 (1991). For the second element, a plaintiff must show both that (a) the  
 7 defendant *actually* copied from the plaintiff’s work, and (b) that *what* defendant  
 8 copied was original “protected” expression. *Id.* (“Not all copying, however, is  
 9 copyright infringement”); 4 M. & D. Nimmer, *Nimmer on Copyright* (“Nimmer”), §  
 10 13.01[B] at 13-8 to 13-10 (2013); *Benay v. Warner Bros. Entertainment, Inc.*, 607  
 11 F.3d 620, 624 (9<sup>th</sup> Cir. 2010); *Funky Films, Inc. v. Time Warner Entert. Co.*, 462 F.3d  
 12 1072, 1081-82 (9<sup>th</sup> Cir. 2006); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822  
 13 (9<sup>th</sup> Cir. 2002); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044, n.2  
 14 (9<sup>th</sup> Cir. 1994).

15 Ideas, facts, and *scenes-a-faire* are not protected. *Feist*, 499 U.S. at 344-45  
 16 (“The most fundamental axiom of copyright law is that ‘[n]o author may copyright his  
 17 ideas or the facts he narrates.’”); *Cavalier*, 297 F.3d at 823 (“*Scenes-a-faire*, or  
 18 situations and incidents that flow necessarily or naturally from a basic plot premise,  
 19 cannot sustain a finding of infringement.”); *Frye v. YMCA Camp Kitaki*, 617 F.3d  
 20 1005, 1008 (8<sup>th</sup> Cir. 2010) (“The principle that a copyright does not protect ideas, but  
 21 only the expression of those ideas, is longstanding.”). Where non-literal copying of  
 22 “protected expression” is alleged, the issue is whether the defendant’s work is  
 23 “substantially similar” to expression in the plaintiff’s work. *Id.*; 4 *Nimmer*,  
 24 §13.03[A][1] at 13-37 to 13-40.1.

25 Where, as here, the lack of similarity between the parties’ respective works is  
 26 obvious, judgment as a matter of law is appropriate notwithstanding the presence of  
 27 potential factual disputes, such as whether Defendant had access to Plaintiffs’  
 28 work. For purposes of this Motion only, Defendant will assume *arguendo* that

1 Plaintiffs own a valid U.S. copyright to the “Belvedere” script and that Defendant had  
 2 access to Plaintiffs’ work. 4 *Nimmer*, § 13.01[A] at 13-7 to -8. What remains to be  
 3 determined is the issue of “copying” of protected expression, which requires that  
 4 Plaintiffs properly allege and prove two distinct elements: actual copying and  
 5 unlawful appropriation. 4 *Nimmer*, § 13.01[B] at 13-8 to -10. Plaintiffs’ copyright  
 6 claim should be dismissed because, as a matter of law, Defendant’s film *Her* is not  
 7 substantially similar to protected expression in Plaintiffs’ script “Belvedere.” *See*,  
 8 *e.g.*, *Nelson v. PRN Productions*, 873 F.2d at 1142 (affirming dismissal although  
 9 defendants stipulated to plaintiff’s ownership of copyright and defendants’ access).

10 **A. Unlawful Appropriation (“Substantial Similarity of Protected**  
 11 **Expression”)**

12 Unlawful appropriation focuses on the legal issue of whether any alleged  
 13 copying extended beyond unprotectible facts, concepts or ideas (17 U.S.C. § 102(b))  
 14 to plaintiff’s protectible expression, that is “the actual concrete elements that make up  
 15 the total sequence of events and the relationships between the major characters.”  
 16 *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985). Neither “access” nor actual  
 17 copying is relevant to whether a defendant’s work is substantially similar to protected  
 18 expression in a plaintiff’s work. 4 *Nimmer*, § 13.03[D] at 13-90 to -92. Thus, even if  
 19 a court assumes that a defendant had access to a plaintiff’s work, there is no  
 20 infringement as a matter of law if the two works are not substantially similar. *See*  
 21 *Benay*, 607 F.3d at 625 (no infringement even if access is assumed); *Funky Films*, 462  
 22 F.3d at 1075 n.1, 1081-82 (same); *Newton v. Diamond*, 388 F. 3d 1189, 1192-93 (9th  
 23 Cir. 2004) (“even where the fact of copying is conceded, no legal consequences will  
 24 follow from that fact unless the copying is substantial”).

25 When, as in this case, non-identical works are compared, the “substantial  
 26 similarity” inquiry involves a legal or policy issue: How far beyond the literal may a  
 27 plaintiff’s copyright monopoly extend? *Harper House, Inc. v. Thomas Nelson, Inc.*,  
 28 889 F.2d 197, 201 (9th Cir. 1989); 4 *Nimmer*, § 13.03[A] at 13-37 to -40.1. If a

1 plaintiff were allowed to extend his monopoly too far, liability would be imposed for  
 2 the “use” of unprotected ideas and facts – rather than protected expression – in  
 3 violation of the First Amendment and copyright policy. *Feist*, 499 U.S. at 344-48,  
 4 349-50; *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 556, 105  
 5 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (the idea/expression dichotomy strikes a  
 6 constitutional balance between copyright and free speech interests).

7 Because storytelling necessarily relies on the use of facts, ideas, clichés,  
 8 *scènes-à-faire*, conventions of story-telling and filmmaking not original to its author,  
 9 see *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002), a plaintiff’s dramatic  
 10 work is only protected from nearly verbatim copying of factual material or from the  
 11 comprehensive non-literal copying of its “story” or “pattern,” the original  
 12 arrangement of characters, their relationships and the essential sequence of events.  
 13 4 *Nimmer*, § 13.03[A][1][b] at 13-41 to -43; *Williams v. Crichton*, 84 F.3d 581, 588-91  
 14 (2d Cir. 1996); *Berkic*, 761 F.2d at 1293-94; *Olson v. National Broadcasting Co.*, 855  
 15 F.2d 1446, 1450 (9th Cir. 1988); *Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir.  
 16 1990); 4 *Nimmer*, § 13.03[A][1] & [2] at 13-36 to -43 & 13-53 to -59.

17 To determine “substantial similarity” between works that are not literally  
 18 similar, the Ninth Circuit employs an “extrinsic” (*i.e.*, objective) and an “intrinsic”  
 19 (*i.e.*, subjective) test, originated in *Sid & Marty Krofft Television Productions, Inc. v.*  
 20 *McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977) (“Krofft”). 4 *Nimmer*,  
 21 § 13.03[E][3] at 13-104 to -118.3. The extrinsic test is to be applied by a court before  
 22 the trier of fact evaluates the intrinsic test. Prompt dismissal of Plaintiffs’ Complaint,  
 23 with prejudice, is warranted under the extrinsic test in this case.

## 24 **B. Extrinsic Test**

25 Under the extrinsic test, the court must first “list and analyze” “specific criteria”  
 26 (eight factors for literary and dramatic works) in each work on an objective basis and  
 27 then compare the works with reference to those factors to determine if they are  
 28 substantially similar in protected “expression.” *Rice v. Fox Broadcasting Co.*, 330

1 F.3d 1170, 1174 (9th Cir. 2003); *Krofft*, 562 F.2d at 1164; *Kouf*, 16 F.3d at 1045.  
 2 “[T]his question may often be decided as a matter of law.” *Krofft*, 562 F.2d at 1164.  
 3 *See also Benay*, 607 F.3d at 624 (“We have frequently affirmed summary judgment in  
 4 favor of copyright defendants on the issue of substantial similarity”) (citations  
 5 omitted); *Funky Films*, 462 F.3d at 1081-82; *Cavalier*, 297 F.3d at 824; *Kouf*, 16 F.3d  
 6 at 1045; *Berkic*, 761 F.2d at 1293; *See v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983).

### 7 **1. No Similarity as to Plot and Sequences of Events**

8 It is quite telling that Plaintiffs’ Complaint does not describe the plot, *i.e.*, the  
 9 story, in each of the two works; nor does it itemize the sequence of events in either  
 10 work. The reason is obvious: the plots of *Her* and “Belvedere” (as summarized in  
 11 Parts I.E. and F., above) are completely different and the works have virtually no  
 12 events in common, let alone a similar sequence of events.

13 All that Plaintiffs can muster is the allegation that the two works have  
 14 “substantially similar concepts in that they examine the human psyche through the  
 15 interactions of the person and each operating system.” (Cpt. ¶21) Even assuming  
 16 *arguendo* that such a concept can fairly be detected in “Belvedere,” this is not the plot  
 17 of either work, but only a statement of overall concept at the highest level of  
 18 generality. It is nothing more than an idea that is not protected by copyright. 17 USC  
 19 §102(b) (“In no case does copyright protection ... extend to any idea, ...concept,  
 20 principle, or discovery, regardless of the form in which it is described, explained,  
 21 illustrated, or embodied in such work”). The extrinsic test compares “[n]ot the basic  
 22 plot ideas for stories,” but the “actual concrete elements” that comprise the works’  
 23 stories. *Berkic*, 761 F.2d at 1293-94. *See Benay*, 607 F.3d at 625 (“In applying the  
 24 extrinsic test, we look ‘beyond the vague, abstracted idea of a general plot.’ [citation  
 25 omitted] Though the [plaintiff’s] Screenplay and the [defendants’] Film share the  
 26 same basic plot premise, a closer inspection reveals that they tell very different  
 27 stories.”).

28 Paragraph 23 of the Complaint does allege the following three similarities: (1)

1 Belv and Samantha are “carried around in the front shirt pocket with the ‘eye’ of the  
 2 operating system facing out,” (2) “both have a radar mode allowing them to scan the  
 3 public,” and (3) both act as the operator’s liason in sending emails, handling daily  
 4 schedules, and making dinner reservations.” Alleged similarity (3) would seem to be  
 5 the *raison d’etre* for personal assistants in mobile devices; Apple’s iPhone  
 6 commercials regularly feature “Siri” performing such routine tasks. These elements  
 7 are unprotected *scenes-a-faire* that flow naturally from the concept of a personal  
 8 mobile assistant. Alleged similarity (2)’s reference to “radar mode” is unrecognizable  
 9 in either *Her* or “Belvedere” but perhaps it is meant only as a way to describe the  
 10 consequences of allowing Samantha and Belv to “see” as in alleged similarity (1).  
 11 Alleged similarity (1) does appear in *Her* and is at least suggested in “Belvedere” but  
 12 it is nothing more than an unprotected idea. No one can have a monopoly on stories  
 13 that feature an operating system that sees out of a mobile device carried in a pocket  
 14 and facing outward. *See, e.g., Berkic*, 761 F.2d at 1293 (“No one can own the basic  
 15 idea for a story.”). Thus, even assuming that the two works share this similar idea,  
 16 that represents at most an isolated event, not a sequence of events. A single idea or  
 17 event (or even a series of ideas or abstract events) is not sufficient to raise an issue of  
 18 fact as to substantial similarity of plot or sequence of events. *Id.* (no triable issue of  
 19 fact as to similarities even though both the plaintiff’s and the defendants’ works “deal  
 20 with criminal organizations that murder healthy young people, then remove and sell  
 21 their vital organs to wealthy people in need of organ transplants”).

## 22 **2. No Similarity as to Characters**

23 The lead character in each work is male and uses a mobile device that embodies  
 24 a technologically-advanced electronic personal assistant. That abstract description is  
 25 the full extent of any similarity in characters in the two works. Theodore in *Her* and  
 26 Phil in “Belvedere” could hardly be more different. *Her*’s Theodore is a man who  
 27 resists finalizing his divorce, daydreaming about happier times in love with his wife.  
 28 He is demonstrably anti-social: he has a playlist specifically filled with “melancholy”



1 songs; he is described as “sad” and “mopey;” he does not return calls or emails from  
 2 the few friends he has; he eats dinner alone, rarely goes out on dates, and prowls  
 3 anonymous chat rooms when he can’t sleep rather than phoning a friend. Plaintiffs’  
 4 Phil has a core group of at least seven friends with whom he constantly socializes,  
 5 plays basketball games, shares wardrobe accessories, gambles, drinks and goes to  
 6 great personal sacrifice to bail out of jail. He is perpetually on the hunt, willing to try  
 7 any pick-up line to get phone numbers of women he meets at bars or on the street.

8 Nor is Samantha in *Her* and Belv in “Belvedere” similar beyond the general  
 9 concept that they are operating systems/electronic assistants (like an iPhone’s “Siri”)  
 10 that can be accessed through mobile devices. Samantha was built from the outset to  
 11 grow and evolve through artificial intelligence; Belv is “a phone that has come to life  
 12 through a bizarre microwave accident.” (Cpt. ¶18.) Samantha in *Her* develops her  
 13 own needs and desires, and her relationship with Theodore grows stronger when he  
 14 commits to helping her explore the world. Although at first, she encourages Theodore  
 15 to accept a blind date arranged by a friend, Samantha seems to become jealous when  
 16 he says he wants to meet his estranged wife in person to sign the divorce papers.  
 17 Plaintiffs’ Belv seems focused primarily on helping Phil pick up women; he “always  
 18 has an ‘eye’ out for the future Mrs. Phil.” (*Id.*) Belv’s other activities of providing  
 19 gambling tips, facilitating binge drinking and engaging in various fun-loving antics  
 20 (*id.*) make him like a fraternity brother to Phil, nothing like the intuitive, sensitive and  
 21 intimate relationship that develops between Samantha and Theodore. The Complaint  
 22 essentially admits that the two characters are dissimilar when it alleges that the two  
 23 works “involve an operating system that has come to life and acts as more of a friend  
 24 and/or sidekick and in *Her*’s case, a sexual lover.” (*Id.*, ¶20.) Of course, “a friend  
 25 and/or sidekick” is quite different than “a sexual lover.”<sup>2</sup>

26  
 27  
 28 <sup>2</sup> Furthermore, the concept of an electronic/computerized assistant who becomes a  
 “friend or sidekick” is a well-worn element in science fiction or science-related works,  
 with *2001: A Space Odyssey* and television’s *Big Bang Theory* just two examples, and  
 Plaintiffs can claim no monopoly on their Belv character. See *Benay*, 607 F.3d at 626  
 (“only distinctive characters are protectable, not characters that merely embody

1 No other characters in the two works bear any similarity to each other.

2 **3. No Similarity as to Themes**

3 The main theme of *Her* is how people are becoming increasingly alienated from  
 4 each other and the role that new technologies play in this regard. These themes are  
 5 illustrated by Theodore's job of writing personal letters for others, demonstrating that  
 6 people have so lost the ability for intimate communication with each other that they  
 7 are willing to pay strangers to fill that role for them; the way in which people on  
 8 elevators and subway trains are interacting with their personal mobile devices rather  
 9 than with each other; Theodore eating dinner alone in a city of millions of people; the  
 10 familiarity with which Theodore uses his device in the middle of the night to search  
 11 for strangers with whom to interact in anonymous trysts; and, of course, Theodore's  
 12 growing attraction to a computer operating system over a real person.

13 The main theme of "Belvedere" appears to be that life can be more enjoyable  
 14 with an electronic, mobile personal assistant: "Belv is a fun-loving, tempermental,  
 15 witty and loyal phone that encourages everyone to make the most out of life as he  
 16 becomes more of a wingman and less of an assistant." (Cpt. ¶18.) The themes in the  
 17 two works are nothing alike.

18 **4. No Similarity as to Settings**

19 *Her* is set in a near-future Los Angeles. We know it is not the present day  
 20 because, among other things, Theodore rides a subway to the beach and the skyline  
 21 reflects many more skyscrapers than Los Angeles currently has. The main settings in  
 22 the movie are Theodore's office, his luxurious-looking apartment, subways/trains and  
 23 associated transit stations, an outdoor shopping mall, the beach and a mountain cabin.  
 24 According to paragraph 18 of the Complaint, "Belvedere" is set in a "big city." It  
 25 takes place perhaps a few years in the past: there are cellphones but Brett Favre still  
 26 plays for the Green Bay Packers. The main settings are Phil's bachelor pad, a local

27  
 28 unprotected ideas"), citing *Olson*, 855 F.2d at 1451-53. The differences between these  
 prior computerized "friends" and *Her*'s Samantha character is one of the things that  
 makes Defendant's film distinctive.



1 park with basketball hoops, the friends' favorite bar, a nearby restaurant and wedding  
 2 receptions in hotel ballrooms. There are no significant similarities in settings between  
 3 the two works.

#### 4 **5. No Similarity as to Mood**

5 *Her* is a deeply introspective movie. The focus is on the inner lives of  
 6 Theodore and Samantha, with additional exploration of the psyches of other women in  
 7 Theodore's life, his ex-wife Catherine and neighbor/friend Amy. Although there are  
 8 amusing moments in *Her*, the overall mood is quiet and contemplative. This is  
 9 illustrated by the opening scene where Theodore, sitting alone at his office computer,  
 10 composes a romantic letter for a stranger, and the closing scene where Theodore and  
 11 Amy gaze, deep in thought but without speaking, at the vast city skyline. In  
 12 comparison, "Belvedere" is boisterous and bawdy. As paragraph 18 of the Complaint  
 13 states, Belv's activities include "pickup lines, gambling, amateur athletics, binge  
 14 drinking, employment advice and antics." There is no similarity in the mood of the  
 15 two works.

#### 16 **6. No Similarity as to Pace**

17 *Her* unfolds over a time period that appears to be several weeks, as Theodore  
 18 and Samantha gradually get to know each other, fall in love, change and grow apart.  
 19 The action takes place in a leisurely fashion throughout the movie. In contrast, the  
 20 episode of "Belvedere" upon which Plaintiffs base their infringement claim takes  
 21 place in the course of one full day. The action in the script is fast-paced, with much of  
 22 the time cutting quickly back and forth between a restaurant or a bar (where some of  
 23 the friends are), and various wedding parties (where another friend is). There is no  
 24 similarity in the pace of the two works.

#### 25 **7. No Similarity as to Dialogue**

26 The Complaint does not quote a single line of dialogue from either *Her* or  
 27 "Belevdere" in support of Plaintiffs' infringement claim. There are no specific  
 28 similarities in any dialogue between the two works.

\* \* \*

In summary, there is no similarity, let alone substantial similarity, between the dramatic motion picture *Her* and the situation comedy reflected in the script “Belvedere.” Plaintiffs’ Complaint fails to allege any specific similarities and any that could be conjured up are no more than abstractions, so vague and generic that their Complaint is subject to dismissal at the pleading stage. *Williams*, 84 F. 3d at 583-87, *Walker*, 784 F.2d at 46 (comparing the book “Fort Apache” and the film “Fort Apache: The Bronx”); *Zella*, 259 F. Supp.2d at 1138. *See also Kouf*, 16 F.3d at 1046; *Litchfield v. Spielberg*, 736 F. 2d 1352, 1356 (9<sup>th</sup> Cir. 1994); *Berkic*, 761 F.2d at 1293.

Thus, Plaintiffs’ only cause of action should be promptly dismissed, without leave to amend. No additional allegations can change the two works at issue or otherwise salvage their copyright claim.

### **III. PLAINTIFFS’ CONTENTION THAT *HER* IS DERIVATIVE OF “BELVEDERE” CANNOT AVOID DISMISSAL**

Apparently recognizing that the two works demonstrably are *not* similar, the Complaint contends that Defendant’s *Her* is a derivative work of Plaintiffs’ script “Belvedere.” (Cpt., heading I, ¶¶19, 24, 25, 26.A [citing 17 U.S.C. §106, the right to prepare derivative works is one of the exclusive rights of a copyright owner].) It is settled law that this tactic cannot create a triable issue of fact or otherwise save the Complaint from dismissal. The plaintiff in an infringement suit over the motion picture *E.T.* made the same argument as Plaintiffs do here, contending that she should be allowed to prove that the defendants’ movie was derived from her copyrighted play without having to show substantial similarities between the two works. The Ninth Circuit rejected the argument, holding:

“A work will be considered a derivative work *only if it would be considered an infringing work* if the material which it has derived from a prior work had been taken without the consent of a copyright proprietor of such prior work.” *United States v. Taxe*, 540 F.2d 961, 965 n. 2 (9th Cir.1976)

(emphasis added). To prove infringement, one must show substantial similarity. *See v. Durang*, 711 F.2d at 143, *Krofft*, 562 F.2d at 1172. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9<sup>th</sup> Cir. 1984). *See also* 1 *Nimmer* §3.01 at 3-3 (“A work is not derivative unless it has *substantially* copied from a prior work. If that which is borrowed consists merely of ideas and not of the expression of ideas, then, *although the work may have in part been derived from prior works, it is not a derivative work.*”) (emphasis added).

Because *Her* is not substantially similar to “Belvedere,” any argument Plaintiffs could make about *Her*’s derivation is irrelevant to their infringement claim.

#### IV. CONCLUSION

Plaintiffs’ script “Belvedere” is not substantially similar to Defendant’s motion picture *Her*. As a result, whether or not Defendant ever had access to “Belvedere” or used it in any way in creating *Her*, Plaintiffs cannot establish a prima facie case of copyright infringement. No other allegations or facts can change the fundamental dissimilarities between the two works.

Defendant respectfully requests that Plaintiffs’ Complaint be dismissed with prejudice in its entirety.

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/s/ Daniel M. Mayeda

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